150(5) was intended to arm the Federal Parliament with power to amend or modify the 1963 Constitution of Sarawak temporarily if that Parliament thought such a step was required by reason of the Emergency, and further, that such an intention must be imputed to the parties to the Malaysia Agreement of 9th July, 1963. Their Lordships, accordingly, hold against the appellant on his second submission and are of opinion that in so far as the impugned Act had the effect of modifying or amending the 1963 Constitution of Sarawak it was *intra vires* and valid.

For these reasons their Lordships were of the opinion that the conclusion reached by the Federal Court of Malaysia was right and that the appeal should be dismissed.

Appeal dismissed.

Solicitors: *T. L. Wilson & Co.; Stephenson, Harwood & Tatham.*

WOO KAM SENG v. VONG TAK KONG

[O.C.J. (Chang Min Tat J.) July 29, 1968]
[Ipoh — Civil Suit No. 96 of 1963]

Contract — Building contract — Use of inferior materials by builder — Issue of architect's certificate — Whether conclusive evidence of completion — Breach of agreement — Measure of damages.

Evidence — Building contract — Whether agreement can be varied by use of another document — Evidence Ordinance, 1950, s. 92.

Architect — Certificate of — Whether conclusive evidence of completion.

The plaintiff a contractor sued the defendant on a building contract for $5,876.62 being the sum of $7,000 stated in the architect's certificate less $1,563.38 for mosaic and wall tiles supplied (as admitted) and for $440 being certain other works carried out which were additional to the agreement. The defendant did not dispute the issue of the architect's certificate but averred that there were breaches of the agreement by the plaintiff and counterclaimed for building materials supplied and $878.08 for window grilles and gates and damages for breach of the agreement. At the hearing it was contended on behalf of the plaintiff that the agreement should be read together with a document in Chinese which it was contended was executed at the same time as the agreement.

Held, dismissing the claim: (1) it is extremely doubtful that it was correct to use the document in Chinese to construe the building agreement. To use the said document (which was executed some 11 days earlier that the building agreement) as contended would be to use it to vary and substract from the terms of the building agreement and that was not permitted by the provisions of section 92 of the Evidence Ordinance;

(2) as the defendant had proved that he had supplied goods to the plaintiff to the value of $5,856.14, the said sum should be set off against the claim;

(3) in this case having regard to the fact that the defendant could have at the appropriate moment prevented the use of materials other than those specified but failed to do so the measure of damages would be the amount by which the value of the house had depreciated by reason of the use of inferior materials, without calculating the cost of replacing the materials used with the materials specified. As no expert evidence was called, taking into consideration all circumstances the sum of of $2,500 would be sufficient compensation to the defendant.

Cases referred to:—

(1) *Billyack* v. *Leyland Construction Co. Ltd.* [1968] 1 W.L.R. 471.

(2) *Hoenig* v. *James* [1952] 2 All E.R. 176, 181.

CIVIL SUIT.

N. Sharma for the plaintiff.

A. Rahim Noor for the defendant.

Cur. Adv. Vult.

Chang Min Tat J.: In this action the plaintiff, a contractor, under an agreement to build a house for the defendant, sued for the sum of $5,876.62 made up of $7,000 the amount stated in the architect's final certificate of payment less $1,563.38 for mosaic and wall tiles supplied as admitted by the defendant to the plaintiff, and a further sum of $440 for the construction of a reinforced concrete bridge and pipe-line, which were additional to the agreement.

The defence, as I understand it, did not dispute the issue of the architect's certificate. It claimed (and it was not clear whether it was by way of a set-off) in addition to the sum for the mosaic and wall tiles admitted by the plaintiff, two other sums of $4,978.06 for building materials supplied to the plaintiff and $878.08 for window grilles and gates. It admitted the construction of the pipe-line for $300 but denied that the bridge was built by the plaintiff for $400 or that of this sum $140 remained to be paid. It averred that it was constructed by an independent contractor, a Wong Teik Kow alias Wong Kow Chye, at a cost of $260. The defence also averred breaches of the contract by the plaintiff and counter-claimed for the building materials supplied and for damages for breach. I shall revert to the counter-claim at a more appropriate stage.

This apparently simple claim in a building contract was however made somewhat complicated by the interpretation sought to be put on the contract by counsel for the plaintiff. It was urged that certain works specified in the building contract, P.3, were to be done by the defendant as he had undertaken to do them in document executed by him on or about the same date. This document, P.2, was a document in Chinese of which the translation was in the following terms:—

CHOP KAM SENG.
SANITARY, PLUMBING AND BUILDING CONTRACTOR.
70, Anderson Road, Ipoh.
Telephone No. 4289. Ipoh, 10.5.1962.

Mr. Tak Kong.

To construct a small bungalow.

Masonry:	Workmanship plus material/s)	2 items) total
Carpentry:	Workmanship plus material/s)	$18,000.00
		$14,239.00 (written in pencil)

Water pipe)
Septic tank)
W.C.) 5 items total $2,800.00
Washbasin)
Sink)

$14,239.00
2,800.00
2,270.00
19,309.00
(written in pencil)

All total $22,800.00

Total $2,000 (Making road/s) (Main water pipe) (Govt. deposit/s) (Electricity not included) (Window iron grille) $20,000. Charge/s separately) Charge/s for lock/s not yet included.

Signed: Vong Tak Kong
(In English) "

It is pertinent to note at this stage that this document was not as alleged executed on or about the same date as the building contract. If the date on it had any meaning, it was executed some 11 days earlier and in point of fact, the evidence led established this.

It was contended by counsel for the plaintiff that P.2 was a concluded agreement and P.2 and P.3 must be read together, and consequently the charges for roads, main water pipe, government deposits, electricity, window iron grille estimated to be $2,000 alleged to be expressed to be excluded in P.2 were not to be included in the building contract, P.3. With respect, and without, for the moment, going into the law of evidence, I am unable to agree. If that was the intention of the parties, it would have been a simple matter of deleting from P.3 all references to such works. There was ample opportunity to do so, as the architect himself testified and no reasonable explanation was afforded why this had not been done. On the other hand, I find them detailed in the special specifications to the contract. Furthermore, the document P.2 plainly and factually did not bear out this submission. The break-down figures in P.2 were as follows:—

(1) Masonry and carpentry	$18.000.00
(2) Water system and fittings	2,800.00
(3) Roads, main water pipe, electricity, window iron grille	2,000.00
	$22,800.00

This was the same total written on the document itself as "All total $22,800." If a meaning was given to "All" and there is no reason why it should not, it follows that this total must include item (3) as above. Now, P.2 in its unamended form was of course the original estimate and tender of the plaintiff for the construction work and as so often happened, it was followed by a hard bargaining between the parties. Obviously the one area that admitted bargaining was item (1), and as a result of such bargaining, the estimate of $18,000 was reduced by some $3,771 to $14,239 and it was so expressed, in pencil, on P.2. No reduction was secured on item (2). Then, on the face of P.2 was this addition, also in pencil:—

$14,239.00
2,800.00
2,270.00
$19,309.00

The first figure was obviously the reduced sum for masonry and carpentry, and the second was, as obviously, for the water system and fittings. The third figure could only refer to the works covered in item (3). It was in fact in excess of the estimate or tender by the plaintiff for this particular item, and in my view the excess provided for the inclusion of locks and other incidentals. The reduction to $19,309 must have cut the plaintiff to the bone and it was not surprising therefore when the concluded contract P.3 was reached, that the consideration was raised to $20,000. Even then, this consideration gave the plaintiff a very small profit, or more correctly, a very small margin for profit. The expectations which the plaintiff hoped to derive from the defendant however would explain why the plaintiff was willing to accept this contract at that price.

The evidence therefore showed that the reduction by $2,800 from $22,800 for the entire contract in P.2 to $20,000 in P.3 was effected through the agreed cutting down of the estimate for masonry and carpentry by some $3,771. I therefore disbelieve the plaintiff and I find as a fact that the works in item (3) were intended to be and were included in the building contract.

For myself, despite the very strong submission by counsel for the plaintiff, I am extremely doubtful that it is correct to use P.2 to construe P.3 or to regard P.2 and P.3 as one entire agreement. Inasmuch as the works in item (3) were provided for in P.3 and the plans annexed thereto, I do not think it can be said that what were excluded in the earlier document must necessarily remain excluded in a subsequent document despite their inclusion in the latter. To use P.2 in the way suggested to me would be to use it to vary and subtract from the terms of P.3 and that is not permitted by the provisions of section 92 of the Evidence Ordinance.

I now come to the vexed question of the building materials alleged by the defendant to have been supplied to but denied by the plaintiff to have been received by him. For these supplies the defendant was able to prove delivery and produce copies of the delivery orders of the goods in question bearing the acknowledgments of receipt by several persons. Delivery order D.9 for 50 bags of cement was signed by the plaintiff himself but, somewhat astonishingly, he would want the court to believe that he did not receive the goods. Delivery orders D.10, D.11, D.12 A-G were signed by Wong Teik Kow alias Wong Kow Chye, D.13 A-F by Siew Kwai Sang, D.14 A-C by Chee Kong and D.15 A-B by Loh Lap. Of these persons, only Wong Teik Kow appeared as a witness and it was for the plaintiff. The plaintiff denied that he knew Chee Kong or Siew Kwai Sang and further that they were his sub-contractors. He however admitted that Loh Lap was his carpenter but he did not know where he was.

On this, it was submitted on behalf of the plaintiff that the defendant had not proved the delivery of the goods in D.13 A-F, D.14 A-G and D.15 A-B. It was the case for the plaintiff that the goods in the delivery orders were after delivery to the site during the construction, subsequently removed by the defendant for other purposes than for use by the plaintiff in the construction of his bungalow. The plaintiff's evidence appeared to a certain extent to be corroborated by the evidence of Wong Teik Kow, but unfortunately for the plaintiff the defence was able through Mr. N. T. Rajah, who was the defendant's solicitor and counsel at the earlier hearing until he was compelled to give up the brief in order to appear as a witness, to produce in evidence a signed statement, D.18, made by Wong Teik Kow to him that he was the plaintiff's *kepala* and that he was personally aware that a large amount of building materials were supplied to the plaintiff by the defendant and that he was able to identify on the delivery orders the signatures of Siew Kwai Sang and Chee Kong whom he knew to be the plaintiff's head carpenter and head painter respectively. Mr. N. T. Rajah further testified that this statement was voluntarily made by the witness and that no inducement was offered. Wong Teik Kow would however have the court believe that he did not receive the goods.

For reasons that are only too obvious, I prefer the evidence of Mr. N. T. Rajah to that of Wong Teik Kow. I therefore find as a fact that the goods specified in the relevant delivery orders were received by Wong Teik Kow, Siew Kwai Sang and Chee Kong on behalf of the plaintiff and used by the plaintiff in the construction of the bungalow. In my view, if the plaintiff desired the court to believe that Siew Kwai Sang and Chee Kong did not receive the goods signed for by them or that these goods were subsequently removed by the defendant, it was on him to call them as his witnesses, as he called Wong Teik Kow, but of course his difficulty lay in his allegation that he did not know them or employ them. As for Loh Lap, the plaintiff had admitted that the locks supplied to him were used on the building. They must therefore be charged to the plaintiff's account.

The sale value of the goods totalled $4,978.06 but that was not what the goods cost the defendant. The defendant by virtue of his position as executive sales manager of the supplying firm was able to claim a certain discount as shown on the delivery orders. The question arose in my mind whether he should be allowed to retain this staff discount for his own benefit. After due consideration, I come to the view that there is no fiduciary relationship between him and the plaintiff that would prevent him from so doing. In paying or setting-off this sum of $4,978.06 the plaintiff would not have paid a cent more than he would have to pay, had he himself purchased the goods in open market, and he would have had the benefit of immediate delivery and deferred payment for a longer period than the ordinary days of credit in commerce. Further it is nowhere pleaded that the discount had to be taken into account.

As for the iron grilles for the windows and collapsible iron gates and entrance gates, I see no reason for not accepting the evidence of the supplier, Foong Fook Choon, D.W.5, that the goods were fitted on the building. They were, as I have found, provided for in the contract, and should have been paid for by the plaintiff.

The reinforced concrete bridge over the roadside drain was another area of contention. The plaintiff claimed the sum of $140 being the balance due from the agreed price of $400. The defendant averred that this extra work was carried out not by the plaintiff but by Wong Teik Kow as an independent contractor and, again, was able to produce a receipt signed by Wong Teik Kow himself. I accept the defendant's evidence that this bridge was not built by the plaintiff.

The charge for $300 for a 400′ long pipeline was admitted by the defendant.

On the claim therefore there was due to the plaintiff on the strength of the certificate of the architect, the sum of $7,000 by way of final progress payment less a sum of $1,536.38 for mosaic and wall tiles supplied and on the admission of the defendant a further sum of $300 due for extra work done. The total was $5,736.62. As against this, the defendant had proved that he had supplied other goods to the

value of $4,978.06 from his firm and incurred an expenditure of $878.08 for window grilles etc. in the total sum of $5,856.14. In my view this is eminently a case for a set-off. Though the word 'set-off' was not specifically used, the facts were pleaded. It was clear that the goods were supplied by the defendant to the plaintiff against what was due from the defendant to the plaintiff. On a set-off therefore, the plaintiff had been overpaid to the extent of $119.52.

In his counterclaim, the defendant had, rather curiously, claimed the entire sum of $7,419.52 for all the building materials supplied by him to the plaintiff including the mosaic and wall tiles without taking into account the amount due to the plaintiff under the architect's final certificate. There is, of course, no reason nor was any suggested to me, why the plaintiff should be deprived of his progress payment. On this head of claim only the excess of the value of the goods supplied over the amount in the certificate could obviously be maintained.

The defendant further claimed damages for work not done under the contract and for depreciation by reason of the use of materials inferior to or other than those specified in the contract. It was in evidence given by the architect that the construction of a metal road, the filling of earth up to floor level and the fixing of precast concrete vents were provided for in the contract, P.3, but were not carried out by the plaintiff. The plaintiff himself admitted that this was so. The defendant gave evidence that these works were carried out by Wong Teik Kow and produced receipts for the sums as detailed in paragraphs 5(a), (b) and (c) of the statement of defence. The total however was $676.50 and not $576.50 as in the counterclaim. Picture-rails were also provided for in the contract but were not fixed by the plaintiff. So far as I can make out, they had still not been fixed. The defendant was however entitled to an amount for work not done and I fix this amount in the sum of $100.

As for the use of inferior materials, it was urged that the architect's certificate was final and conclusive, and as I understand the argument, also conclusive that the work was satisfactorily carried out in accordance with the the agreement. It could not be so. In the latest case of *Billyack* v. *Leyland Construction Co. Ltd.*,[1] it was held that the issue of the certificate was not conclusive evidence of completion of the house in accordance with the agreement but was conclusive evidence only of the time fixed for the payment under the agreement. The evidence in this case and the admission by the plaintiff clearly showed that the construction departed from the agreement in at least the two particulars specified and by reason thereof the defendant had suffered damages.

This head of damages presented certain difficulties of assessment which were not resolved by the failure on the part of the defendant to call the relevant evidence. For the use of *chengai batu* and other low-grade hardwood instead of the agreed tanalised timber, the defendant claimed $2,500, and for the substitution of the cast-iron soil pipes with glazed earthenware, $1,000. On the other hand, it was suggested by the plaintiff that the quantum of damages to be allowed would be the difference between the values of the goods contracted for and actually supplied. Counsel for the defendant had not explained how the defendant's figures were arrived at. On the other hand, counsel for the plaintiff could obviously not be right.

The decision of Denning L.J. (as he then was) in *Hoeing* v. *James* [2] is that the measure of damages is the amount which the work is worth less by reason of the defects and omissions and is usually calculated by the cost of making them good. In this case, however, the cost of making good the defects seems to me to be an impossible burden on the plaintiff as changing the wood used for the tanalised timber agreed to be used would involve virtually the demolition of the entire building and its reconstruction. I propose therefore to err to the advantage of the plaintiff and, with respect, take the view that in this case and having regard to the fact that the defendant could have at the appropriate moment prevented the use of materials other than those specified but failed to do so, the measure of damages would be the amount by which the value of the house had depreciated by reason of the use of inferior materials, without calculating the cost of replacing the materials used with the materials specified. No expert evidence was called and it is left to me to do the best I can. In a country in which the high humidity of its climate is a well-known geographical fact and in which the presence of wood-destroying insects is notorious, the use of chemically-treated tanalised timber must make for a better house and for its better valuation. The bearing strength of cast-iron over earthenware is too obvious to need comment. In all the circumstances of the case, I am therefore of opinion that the sum of $1,500 would be sufficient compensation.

The claim is dismissed with costs. The counterclaim succeeds and there will be judgment for the defendants on the counterclaim in the sum of $2,396.02 with costs.

Claim dismissed; counterclaim allowed.

Solicitors: *N. Sharma; Maxwell, Kenion, Cowdy & Jones.*